APPENDIX A

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

[Filed Nov. 16, 1998]

P-98-CA-27

YSLETA DEL SUR PUEBLO

v.

EL PASO COUNTY WATER
IMPROVEMENT DISTRICT No. 1

ORDER DISMISSING CASE ON ELEVENTH AMENDMENT GROUNDS

BEFORE THE COURT in the above-captioned cause of action is Plaintiff's Motion for Order on Eleventh Amendment and Other Immunity Issues, filed September 23, 1998, Defendant's Response, filed October 5, 1998, and Plaintiff's Letter Brief in Reply to Defendant's Response, filed October 8, 1998. After due consideration, the Court is of the opinion that Plaintiff's claim should be dismissed for lack of jurisdiction.

Factual and Procedural Background

The Plaintiff, the Ysleta del Sur Pueblo ("Tribe"), a federally recognized Indian tribe, seeks to eject El Paso County Water Improvement District No. 1 ("EPCWID") from property EPCWID possesses in the present day Ysleta and Socorro Grants in El Paso County, Texas and seeks damages resulting from EPCWID's alleged trespass on such property.

The Tribe filed its Complaint on March 11, 1998, asserting that the Tribe is rightfully entitled to possess the subject property based on a 1751 Spanish Grant and a prior aboriginal right of possession. The Tribe alleges that neither the Kingdom of Spain, its successor the Republic of Mexico, or the Republic of Texas ever terminated the Tribe's legal title in any of its lands or its aboriginal right to possess its lands. Further, the Tribe claims its legal title and aboriginal rights are protected by the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922 and the Trade and Intercourse Act, ch. 33, 1 Stat. 137 ("the Indian Non-Intercourse Act"), as amended. Through various Relinquishment Acts, the State of Texas relinquished the subject properties to the people of the towns of Ysleta and Socorro, respectively.

Defendant El Paso County Water Improvement District No. 1 acts as an agent of the State of Texas in handling individual contracts between water users and the United States and to levy taxes and assessments on lands involved in the Rio Grande Reclamation Project, and was organized in accordance with the general laws of Texas and pursuant to Article XVI, section 59 of the Constitution of the State of Texas. (Defendant's Original Answer ¶¶ 45-47.) EPCWID contends that the Tribe was not a federally recognized Indian tribe prior to 1968 and that non-Indian land is the subject of this litigation. Consequently, EPCWID denies that the Indian Non-Intercourse Act, federal Indian common law, or the Treaty of Guadalupe Hidalgo apply to this case. EPCWID denies that the Tribe is entitled to possess the subject property, whether under a 1751 Spanish Grant or any alleged prior aboriginal right of possession.

EPCWID claims that it is a political subdivision of the State of Texas and as such possesses sovereign immunity to suit and is immune to the Tribe's claims for damages. It also asserts the affirmative defenses of laches and statute of limitations, and further claims that if the Tribe ever had any

aboriginal right of possession to the subject lands, such right was extinguished long ago by the actions of the United States.

Plaintiff's (the Tribe's) Motion requests the Court to affirm its jurisdiction over EPCWID or to dismiss the case based on Eleventh Amendment immunity. The Tribe acknowledges that EPCWID is a political subdivision of the State of Texas, organized and existing pursuant to Article XVI, Section 59 of the Constitution of the State of Texas, but claims it is not an alter-ego agency of the State (Original Complaint ¶5; First Amended Original Complaint ¶5.)

EPCWID urges that this action should be dismissed because, as a political subdivision operating •pursuant to Article XVI, Section 59 of the Texas Constitution, it is entitled to sovereign immunity.

Discussion

Is the Water District Entitled to Sovereign Immunity?

EPCWID asserts that the Tribe's claims are barred by the Eleventh Amendment to the United States Constitution, which provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State. U.S. CONST. amend XI. Thus, a state is constitutionally immune from actions brought in federal courts by its own citizens or citizens of other states, unless it consents to be sued. *Hans v. Louisiana,* 134 U.S. 1, 3, 19 (1890); *Scott v. Board of Supervisors of La. State Univ.,* 336 F.2d 557, 558 (5th Cir. 1964); *Edelman v. Jordan,* 415 U.S. 651, 663 (1974); *Florida Dep't of States v.Treasure Salvors, Inc.,* 458 U.S. 670, 683 n.17 (1982); *In re State of New York,* 256 U.S. 490, 497 (1921). *See also Aerojet-General Corp. v. Askew,* 453 F.2d 819, 828 (5th Cir. 1971) (setting forth a two-pronged test for the existence of Eleventh Amendment immunity: (1) whether the action is against the state, and (2)

if so, whether the state consented to be sued in the federal courts), and *Voisin's Oyster House, Inc. v. Guidry,* 799 F.2d 183, 185-86 (5th Cir. 1986) (noting that Eleventh Amendment bars suits in federal court by citizens of a state against their own state or a state agency or department). Sovereign immunity of the Eleventh Amendment restricts suits against states by sovereigns as well as by individuals. *Monaco v. Mississippi,* 292 U.S. 313, 321-22, 330 (1933) (holding that a state, without consenting, may not be sued by its own citizens, foreign corporations, other states, or foreign states). Eleventh Amendment immunity also applies to a suit by an Indian tribe against a state. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782 (1991) (recognizing that Indian tribes enjoy immunity against suit by the states and vice versa); *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 117 S.Ct. 2028 (1997)(according Indian tribes the same status as foreign sovereigns and recognizing that sovereign immunity restricts suits by sovereigns against sovereigns). Plaintiff concedes in its pleadings that the Ysleta del Sur Pueblo is a federally recognized Indian tribe. (Original Complaint ¶4; First Amended Original Complaint ¶4). The Tribe and a fortiorari its members are therefore subject to Eleventh Amendment immunity. *Coeur d'Alene Tribe,* 117 S.Ct. at 2033-34.

A State can waive its sovereign immunity and consent to being sued. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984), citing *Clark v. Barnard,* 108 U.S. 436, 447 (1883); *Coeur d'Alene Tribe,* 117 S.Ct. at 2033. The State's consent, however, must be unequivocally expressed. *Pennhurst,* 465 U.S. at 99, citing *Edelman v. Jordan,* 415 U.S. 651, 673 (1974); *Papasan v. Allain,* 478 U.S. 265, 276 n.10 (1986). Absent such waiver, neither a state or agencies acting under its control are subject to suit in federal court. *Sherwinski v. Peterson,* 98 F.3d 849, 851 (5th Cir. 1996), citing *Puerto Rico Aquaduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993).

A clear showing of congressional purpose is required to abrogate Eleventh Amendment immunity, such as enactment of a federal statute that explicitly and on its face indicates an intent to sweep away the immunity of the States or that has a history which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. *Quern v. Jordan,* 440 U.S. 332, 343-45 (1979) (holding that 42 U.S.C. § 1983 does not override state's Eleventh Amendment immunity). *See also Pennhurst,* 465 U.S. at 99, quoting *Quern,* 440 U.S. at 342 (requiring an unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several States" in the context of civil rights legislation and the Fourteenth Amendment). In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, the Court will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman,* 415 U.S. at 673, quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (1909).

In *Idaho v. Coeur d'Alene Tribe,* a federally recognized Indian tribe brought suit against the state and its officials and agencies, alleging an ongoing violation of its property rights in contravention of federal law. 521 U.S. 261, 117 S.Ct. 2028, 2040 (1997)[1]. Specifically, the Coeur d'Alene Tribe ("CDA

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[1] The Coeur d'Alene Tribe requested injunctive relief in *Idaho v. Coeur d'Alene Tribe,* seeking to invoke the *Ex parte Young* exception to the Eleventh Amendment bar. 117 S.Ct. at 2043. In *Ex Parte Young,* the Supreme Court recognized an exception to a state's Eleventh Amendment immunity for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. 117 S.Ct. at 2030; *Ex Parte Young,* 209 U.S. 123 (1908). While the Supreme Court did find the *Young* doctrine applicable, it allowed claims for declaratory and injunctive relief to proceed only insofar as they sought to preclude ongoing violations of federal law. *Id.* Because the Ysleta del Sur Pueblo Tribe did not include

Tribe") claimed ownership in the submerged lands and bed of Coeur d'Alene Lake and various of its navigable tributaries and effluents lying within the original boundaries of the Coeur d'Alene Reservation. *Id.* at 2030-32. In the alternative, the CDA Tribe claimed ownership of the submerged lands pursuant to unextinguished aboriginal title. *Id.* at 2032. The Coeur d' Alene Tribe asked the Court to declare that the disputed lands were for the exclusive use, occupancy and enjoyment of the tribe and to invalidate all statutes and regulations purporting to regulate the lands. *Id.* The Court found that the CDA Tribe's suit was the functional equivalent of a quiet title action which implicates special sovereignty interests. *Id.* at 2040. As such, the CDA Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent, because the Eleventh Amendment would bar it. *Id.* Although the relief requested is not as extensive, the nature of suit in the instant case is strikingly similar to that of the *Coeur d'Alene* suit: the Ysleta del Sur Pueblo seeks to establish its rightful title to certain property within the Ysleta and Socorro Grants and to exclude EPCWID from possession. On these facts, the instant suit too is the functional equivalent of a quiet title action, and thus cannot be maintained in federal court without the consent of the State of Texas. *See id.* To hold otherwise would allow the federal court to summon a state before it in a private action seeking to divest the state of a property interest, a power clearly beyond the Court's authority to act. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (1982).

The instant case is a property rights suit seeking relief in the form of ejectment and damages resulting from trespass. The federal statutes implicated include the Indian Non-

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state officers as defendants, the *Ex Parte Young* exception has no application in the instant case.

Intercourse Act and any treaties which may have been codified. State statutes at issue include various Relinquishment Acts. Neither party has cited any evidence of Congressional or state legislative intent to abrogate Eleventh Amendment immunity in these particular acts of legislation. Likewise, neither party has established by state statute or otherwise that either the State of Texas or its agent El Paso County Water Improvement District No. 1 consented to be sued. Consequently, the Eleventh Amendment bars the Tribe's claim in federal court against the State of Texas.

Having determined that the Tribe's claim is barred by the Eleventh Amendment if asserted against the State, the question that remains is whether the State of Texas is the real party in interest in this suit brought against EPCWID. The nature of the suit as one against the State is to be determined by the essential nature and effect of the proceeding. *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945). The Fifth Circuit Court of Appeals has taken a case-by-case approach to determining whether a State is the real party in interest in suits brought against entities which appear to be alter egos of the State. *Richardson v. Southern Univ.*, 118 F.3d 450 (5th Cir. 1997). "A federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself.' " *Id.*, citing *Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 874 (5th Cir.), in turn quoting *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982)), *cert. denied*, 502 U.S. 866 (1991). *See also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (finding school board was more like county or city than it was like arm of state, and it therefore was not entitled to assert Eleventh Amendment immunity where, under state law, "state" did not include "political subdivisions" and "political subdivisions" did include local school district); *Sessions v. Rusk State Hospital*,

648 F.2d 1066, 1069 (5th Cir. 1981) (concluding that Rusk State Hospital is an arm of the state for Eleventh Amendment purposes because it is a state institution under exclusive control of Texas Department of Mental Health and Mental Retardation). The Fifth Circuit identifies six factors that guide its determination of whether a particular entity is an arm of the State:[2]

(1) whether the state statutes and case law characterize the agency as an arm of the state;

(2) the source of the funds for the entity;

(3) the degree of local autonomy the entity enjoys;

(4) whether the entity is concerned primarily with local, as opposed to state-wide problems;

(5) whether the entity has authority to sue and be sued in its own name; and

(6) whether the entity has the right to hold and use property.

Delahoussaye v. City of New Iberia, 937 F.2d 144, 147 (5th Cir.1991), citing *Minton v. St. Bernard Parish School Bd.,* 803 F.2d 129, 131 (5th Cir.1986) (footnote omitted) (quoting *Clark v. Tarrant County,* 798 F.2d 736, 744 (5th Cir.1986)). Applying this test in *Delahoussaye,* a state university was

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[2] This "test" is identical to the test applied by the Fifth Circuit in diversity jurisdiction case law, to determine whether a governmental body could be considered a "citizen" or alter ego of a state. *Richardson,* 118 F.2d at 452 n.8, citing *PYCA Indus., Inc. v. Harrison County Waste Water Management Dist.,* 81 F.3d 1412, 1416 n.2 (5th Cir.1996) (" '[T]he analysis of an [entity's] status is virtually identical whether the case involves determination of immunity under the Eleventh Amendment or a determination of citizenship for diversity purposes.' " (quoting *Tradigrain, Inc. v. Mississippi State Port Auth.,* 701 F.2d 1131, 1132 (5th Cir. 1983)).

determined to be an arm of the State and thus entitled to Eleventh Amendment immunity. *Delahoussaye,* 937 F.2d at 147. Similarly in *Richardson,* a state university and its board of supervisors were entitled to sovereign immunity in an action by a student, as the state was the real party in interest. *Richardson,* 118 F.3d at 456. In applying the *Delahoussaye* factors to the Greater New Orleans Express Commission ("GNOEC"), however, the Court concluded that the GNOEC was not an arm of the state and, therefore, was not shielded by the state's Eleventh Amendment immunity. *Pendergrass v. Greater New Orleans Express Comm'n,* 144 F.3d 342, 343 (5th Cir.1998). *See also McDonald v. Board of Miss. Levee Comm'rs,* 832 F.2d 901 (5th Cir.1987) (finding that Board of Mississippi Land Commissioners was not arm of state and was not entitled to Eleventh Amendment immunity, even though its existence was mandated by State Constitution).

The fact that EPCWID may be cloaked with some indicia of state power may not be sufficient to immunize it from suit in federal court. The United States Supreme Court has consistently refused to construe the Eleventh Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.' *Lake Country Estates v. Tahoe Reg'l Planning Agency,* 440 U.S. 391, 400-01 (1979). A county does not occupy the same position as a state for purposes of the Eleventh Amendment; a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment. *Edelman,* 415 U.S. at 667 n.12 (1974). In examining EPCWID to determine whether the suit is in reality a suit against the state itself, EPCWID may nevertheless qualify for sovereign immunity if the state is a necessary party to the suit. *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n,* 762 F.2d 435, 438 (5th Cir. 1985).

Jacintoport predates *Delahoussaye* and *Clark* (on which *Delahoussaye* is based), and sets forth the Fifth Circuit's multi-factor test to determine immunity under the Eleventh Amendment. *Id.* at 438-40, 442. *Clark* adopts the *Jacintoport* factors. The *Delahoussaye* factors are essentially identical to the *Jacintoport* factors, although *Delahoussaye* does not directly cite *Jacintoport.* In *Jacintoport,* the factor that "subsumes all others" is the treatment of the entity in state courts. *Id.* at 438, citing *Huber, Hunt & Nichols v. Architectural Stone Co.,* 625 F.2d 22, 25 (1980). Other factors comprising the Fifth Circuit's test for Eleventh Amendment immunity in *Jacintoport* include:

(1) financial independence, that is, whether the judgment will be satisfied by the entity's funds or by state appropriations, and other aspects of financial autonomy such as the extent of the state's liability for the entity's general debts and obligations (as opposed to liability for a judgment);

(2) the entity's degree of local autonomy and control, and most importantly, whether the funds to defray any award would be derived from the state treasury, including an analysis of the extent of the entity's independent management authority;

(3) whether the agency has express authority to sue and be sued in its corporate name;

(4) whether the agency has been granted the right to hold and use property; and

(5) whether the agency is primarily concerned with local, as opposed to statewide, problems.

Jacintoport, 762 F.2d at 438-40, 442 (citations omitted). In a typical situation, some of these factors will point to immunity, while others will just as strongly suggest that the entity is an independent political subdivision not entitled to

immunity. *Id.* at 442, citing *Tradigrain,* 701 F.2d at 1133. The Court "must never, however, lose sight of the primary question involved: whether the state is the real party in interest in the lawsuit nominally brought against the agency". *Id.*

Several years after the *Jacintoport* decision and without considering factors similar to those in *Jacintoport,* the Texas Supreme Court reached the conclusion that the Port of Houston Authority is a political subdivision of the State that is protected by governmental immunity except to the extent that it has been waived. *Guillory v. Port of Houston Auth.,* 845 S.W.2d 812, 813 (Texas 1993). The *Guillory* court reasoned that governmental units created under article XVI, section 59 of the Texas Constitution are entirely governmental in function. *Id.* at 814. The Court affirmed the Texas Court of Appeals' holding that a navigation district like the Port Authority is such a political subdivision, which can act only in a governmental capacity and not in a proprietary capacity. *Id.* at 813. The *Guillory* Court further stated that "[w]ater improvement districts . . . created under [article XVI, section 59] are created by the Legislature for general public purposes" and that immunity is applied on the basis of creation of the governmental unit. *Id.* at 814. This decision was consistent with the Fifth Circuit's ruling in *Kamani v. Port of Houston Auth.,* 702 F.2d 612, 613 (5th Cir. 1983), which classified the Port of Houston Authority as "a creature of state law and a political subdivision of the State of Texas," entitling it to Eleventh Amendment sovereign immunity from a maritime tort claim.

Nine years after the Fifth Circuit's *Jacintoport* decision, the United States Supreme Court declined to find the Port Authority Trans-Hudson ("PATH") entitled to Eleventh Amendment immunity in a suit by injured railroad workers against PATH, seeking recovery under Federal Employers' Liability Act (FELA). *Hess v. Port Auth. Trans-Hudson*

Corp., 513 U.S. 30, 50 (1994). The Court first determined that there was no genuine threat to the dignity of New York or New Jersey in allowing the workers to pursue FELA claims in federal court. It then focused on determining whether there was good reason to believe the states and Congress designed the Port Authority to enjoy Eleventh Amendment immunity. *Id.* at 46. The Court recognized that the impetus for the Eleventh Amendment is the prevention of federal court judgments that must be paid out of a State's treasury. *Id.* The Court went on to state that the proper focus of an Eleventh Amendment inquiry is on losses and debts. *Id.* at 51. If the State is not obligated to bear and pay the resulting indebtedness of the enterprise when expenditures of the enterprise exceed receipts, then the Eleventh Amendment's core concern is not implicated. *Id.*

One year after *Hess* was decided, the Fifth Circuit reverted again to its *Kamani* analysis, finding the Port of Corpus Christi Authority legally and factually indistinguishable from the Port Authority of Houston ("a creature of state law and a political subdivision of the State of Texas" entitled to Eleventh Amendment immunity). *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995). The Court reasoned that, because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* did not overrule *Kamani* or control the disposition of the case. *Id.*

Fortunately, the Fifth Circuit's apparent "bright-line" test established in *Pillsbury* makes it unnecessary for this Court to engage in either the *Delahoussaye/Jacintoport* or the *Hess* analyses to determine whether EPCWID is an entity whose nexus with the state entitles it to assert sovereign immunity. As helpfully referenced in EPCWID's Response, the history and nature of EPCWID are summarized as follows:

> The plaintiff District was established in 1917 under the authority of a Texas Statute. Later it was converted into

> a conservation and reclamation district under the Constitution of Texas, Vernon's Ann. St. Const. Tex. art. 16, [section] 59, but without any change of name. Under the statute it has a broad right of eminent domain 'and the authority hereby conferred shall authorize and empower such districts to condemn all lands, private and public, for the purpose herein indicated, beyond the boundary of such districts and in any county within the State of Texas', and it also has the power of taxation. In fact, such districts and various other similar districts are not classed with municipal corporations, but are held to be political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law.
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> It is not only an arm of the State, but is fashioned to perform public service and duties of high importance in the welfare of the people of Texas.

El Paso County Water Improvement District No. 1 v. City of El Paso, 133 F. Supp. 894, 914 (D.C. 1955), *reformed in part on other grounds and aff'd in part*, 243 F.2d 927, *cert. denied*, 355 U.S. 820 (1957). As earlier stated, Plaintiff (the Tribe) acknowledges in its Amended (and Original) Complaint that EPCWID is a political subdivision of the State of Texas, organized and existing pursuant to Article XVI, Section 59 of the Texas State Constitution. The Court will therefore apply the *Kamani/Guillory/Pillsbury* approach regarding entities created under Article XVI, section 59 of the Constitution of the State of Texas in this case. Thus, EPCWID is entitled to Eleventh Amendment immunity by virtue of how it was created and is operated.

Eleventh Amendment sovereign immunity deprives a federal court of jurisdiction to hear a suit against a state. *Warnock v. Pecos County, Tex.*, 88 F.3d 341 (5th Cir. 1996), citing *Pennhurst State School and Hosp. v. Halderman*, 465

U.S. 89, 100 (1984). Because this Court has no jurisdiction to decide the Tribe's claim, it must be dismissed.

Finding *Pillsbury* wholly dispositive, the Court declines to reach the issue of whether either the *Hess* analysis or the six-factor balancing test set forth in *Jacintoport* and *Delahoussaye* results in a finding of sovereign immunity.

Conclusion

Because El Paso County Water Improvement District No. 1 was created and still operates pursuant to Article XVI, Section 59 of the Texas Constitution, it is entitled to sovereign immunity under the Eleventh Amendment. Therefore, this action should properly be dismissed because this Court lacks jurisdiction to entertain the Ysleta del Sur Pueblo's claim. Accordingly,

IT IS ORDERED that Plaintiffs' Complaint be DISMISSED for lack of jurisdiction. Costs are assessed against Plaintiff.

All other pending motions are DENIED AS MOOT.

SIGNED this 13th day of November, 1998.

/s/ Lucius D. Bunton, III
LUCIUS D. BUNTON, III
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Apr. 10, 2000]

No. 98-51203
Summary Calendar

D.C. Docket No. P-98-CV-27

YSLETA DEL SUR PUEBLO
Plaintiff-Appellant

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1
Defendant-Appellee

SOUTHWESTERN BELL TELEPHONE COMPANY
Not Party

Appeal from the United States District Court for the Western District of Texas, Pecos.

Before POLITZ, WIENER, and STEWART, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: May 2, 2000.

A True Copy
Test

Clerk, U.S. Court of Appeals, Fifth Circuit
By: /s/ Shari Stevenson
Deputy
New Orleans, Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Apr. 10, 2000]

No. 98-51203

(Summary Calendar)

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellant,

Versus

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
Defendant-Appellee.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Not Party.

Appeal from the United States District Court
For the Western District of Texas
USDC No. P-98-CV-27

Before POLITZ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant The Yselta Del Sur Pueblo ("Pueblo") appeals the district court's dismissal of its complaint against the El Paso County Water Improvement District No. 1 ("District") for lack of jurisdiction. The Pueblo argues that 1) the district court erred in determining that the District is the

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

alter ago of the State of Texas and therefore immune to suit pursuant to the Eleventh Amendment, 2) Congress abrogated the State's Eleventh Amendment immunity in the Indian Non-Intercourse Act, 25 U.S.C. § 177, and 3) the State, by transacting in the Pueblo's lands, constructively waived Eleventh Amendment immunity by engaging in an activity regulated by Congress. Southwestern Bell Telephone Company ("Southwestern Bell") has filed a motion for leave to file an amicus brief out of time, which the District opposes.

We find that Southwestern Bell's motion is untimely, that the issue Southwestern Bell seeks to address has been adequately briefed by the Pueblo and the District, and that granting Southwestern Bell's motion would result in the needless delay of this case's disposition. *See* Fed. R. App. P. 29. Accordingly, Southwestern Bell's motion is denied.

We have reviewed the record and briefs submitted by the parties and find that the Pueblo's arguments lack merit. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2226 (1999); *Ysleta Del Sur Pueblo v. Laney*, 199 F.3d 281, 286-88 (5th Cir. 2000); *Pillsbury Co., Inc. v. Port of Corpus Christi Authority*, 66 F.3d 103, 104 (5th Cir. 1995); *Kamani v. Port of Houston Authority*, 702 F.2d 612, 613 (5th Cir. 1983).

AFFIRMED.